U.S.

05-752 DEC 7 - 2005

No. 05- OFFICE OF THE CLERK

In the Supreme Court of the United States

MARY TOUVELL,

Petitioner,

v.

OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the self-care and retaliation provisions of the Family and Medical Leave Act, 29 U.S.C. §§ 2612(a)(1)(D); 2615(a)(1), are proper exercises of Congress's power under Section 5 of the Fourteenth Amendment?

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The opinion of the court of appeals (App. A, *infra*, 1a-24a) is reported at *Touvell v. Ohio Dept. of Mental Retardation & Developmental Disabilities*, 422 F.3d 392 (6th Cir. 2005). The opinion of the district court, *Touvell v. Ohio Dept. of Mental Retardation & Developmental Disabilities*, No. 2-04-250 (S.D. Ohio 2004)(App. A., *infra*, 21a-30a,), is unreported.

JURISDICTION

The court of appeals entered its judgment on September 9, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced at Appendices C and D, *infra*, 31a-36a.

STATEMENT OF THE CASE

On April 2, 2004, Mary Touvell, the Petitioner, timely filed a Family and Medical Leave Act (FMLA) lawsuit in the Southern District of Ohio alleging that her discharge by the Ohio Department of Mental Retardation and Developmental Disabilities ("Department") violated the FMLA by depriving her of an unpaid leave for self-care, 29 U.S.C. § 2612(a)(1)(D), and retaliating against her for asserting her FMLA rights. 29 U.S.C. § 2615(a)(1). On July 30, 2004, the Department's motion to dismiss for lack of subject matter jurisdiction, *Fed. R. Civ. P.* 12(b)(1), was granted by the District Judge on the sole ground that the FMLA's abrogation

of the States' Eleventh Amendment immunity was unconstitutional.

A timely Notice of Appeal was filed, pursuant to 28 U.S.C. § 1291 and *Fed. R. App.* 4, on August 10, 2004. On September 9, 2005, a panel of the Court of Appeals for the Sixth Circuit affirmed dismissal on the sole ground that the FMLA was not a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment. Rehearing *en banc* was not sought.

Petitioner was an unclassified Therapeutic Program Worker (TPW) employed at the Cambridge Developmental Center, an institution for individuals with severe and profound mental retardation which was operated by the Ohio Department of Mental Retardation and Developmental Disabilities. *Complaint*, ¶¶ 2;3. In her position, Ms. Touvell had to lift patients, and during her first year on the job she started to experience back problems. *Complaint*, ¶¶ 4-6.

On or about September 5, 2003, Ms. Touvell's physician excused her from work because of her back pain. *Complaint*, ¶¶ 7;8. She returned to work on September 16, 2003, but lifting continued to cause her pain, and her physician then excused her from work for the period from September 19 through October 17, 2003. *Complaint*, ¶ 13. Even though her back problems constituted a serious health condition and she sought FMLA unpaid leave, the Department terminated Ms. Touvell on September 29, 2003, for excessive absenteeism. *Complaint*, ¶ 15.

REASONS FOR GRANTING THE PETITION

The court of appeals held unconstitutional two provisions of an Act of Congress by sharply departing from the analytical

framework prescribed by this Court in *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003), where a third provision of the Family and Medical Leave Act (FMLA) was upheld as a constitutional abrogation of Eleventh Amendment immunity. The lower federal courts are in disarray over whether *Hibbs* had any impact on the self-care and retaliation provisions and on the constitutionality of Congress's attempted exercise of Fourteenth Amendment enforcement power. Rather than leave State employees and State employers to sort out the disarray during the next few years, granting this Petition would enable the Court to authoritatively resolve those issues.

1. The court of appeals' decision conflicts with one circuit's decision and decisions of one or more district courts in other circuits, though it comports with another circuit's decision, pre-*Hibbs* decisions in several circuits, and certain district court decisions. Thus, State employees in some jurisdictions may bring FMLA claims against their employer, State employees in the Sixth and the Tenth Circuits may not, and State employees in other circuits face the barrier of pre-*Hibbs* and some district court decisions

The decision of the court of appeals agrees with *Brockman v. Wyoming Department of Family Services*, 342 F.3d 1159 (10th Cir.2003), *cert. denied*, 540 U.S. 1219 (2004), and certain district court decisions.[1] The FMLA self-care

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[1] *See Wennihan v. AHCCCS*, 2005 WL 1876297 (D. Ariz. 2005)(applying *Brockman* to self-care provision); *Cisneros v. Colorado*, 2005 WL 1719755 (D. Colo. 2005)(adhering to *Brockman* on self-care provision and extending holding to retaliation provision); *Stephen v. Creal*, 2005 WL 1159411 (S.D. Ohio 2005)(applying district court decision in *Touvell*); *Solley v. Big Spring State Hosp.* 2004 WL 1553423 (N.D. Tex. 2004)(applying *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000), to

provision has, however, been upheld as a constitutional exercise of Fourteenth Amendment enforcement power in *Montgomery v. Maryland,* 72 Fed.Appx. 17 (4th Cir. 2003)(applying *Hibbs* to medical leave for surgery); and *Toeller v. Wisconsin Department of Corrections,* 296 F.Supp.2d 946 (E.D. Wis.2003), *on reh'g*, 390 F.Supp.2d 792 (E.D. Wis. 2005); and the retaliation provision similarly upheld, though in a case involving an employee's prospective maternity, rather than self-care, leave in *Malone v. Shenandoah County Dept. of Social Services*, 2005 WL 1902857 (W.D. Va. 2005).

2. The court of appeals' decision is flatly inconsistent with *Hibbs* because it persists in rejecting deference to the explicit basis of combating sex and pregnancy discrimination that Congress had for enacting the FMLA self-care provision and the tight relationship between the FMLA retaliation provision and both the self-care and family-care provisions. *See* 29 U.S.C. § 2601(a)(6); (b)(4); (5).[2]

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retaliation provision); *Bryant v. Miss. State Univ.*, 329 F.Supp.2d 818, 824 n.4, 827 (E.D.Miss.2004)(acknowledging "questionable" precedential value of *Kazmeir* and applying *Brockman* to self-care provision).

[2]*See also Hibbs*, 538 U.S. at 738 ("Indeed, in light of the evidence before Congress, a statute mirroring Title VII, that simply mandated gender equality in the administration of leave benefits, would not have achieved Congress' remedial object."); *S.Rep. No. 102-68* at 35 (1991)("Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability."); *The Parental and Medical Leave Act of 1986: Joint Hearing on H.R. 4300 Before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on*

In *Hibbs* and *Tennessee v. Lane*, 541 U.S. 509, 518 n.3 (2004), the original analytical framework for measuring exercises of enforcement power under the Fourteenth Amendment when heightened scrutiny is afforded the classification or right was restored. In *Ex Parte Virginia,* 100 U.S. (10 Otto) 339 (1879), the Court deferred to a rational congressional judgment that legislation enforced the Fourteenth Amendment. That framework was confirmed in *Katzenbach v. Morgan,* 384 U.S. 641 (1966), where the Court recognized that Congress may enforce the Fourteenth Amendment by prophylactic regulation of conduct which had not been judicially determined in violation of the Equal Protection Clause, and applied to sex discrimination in *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976).

Under the *Hibbs* analytical framework, the self-care provision is remedial, not substantive, because sex and pregnancy discrimination receive heightened scrutiny under Section 1 of the Fourteenth Amendment. The court of appeals characterized the FMLA self-care provision as targeting disability discrimination and distinguished *Hibbs* away. Congress's exercise of its Fourteenth Amendment enforcement power must, however, be measured by what Congress perceived and regulated.

The FMLA retaliation provision is integrally related to the self-care and family-care provisions. *See Jackson v. Birmingham Bd. of Ed.*, 125 S.Ct. 1497, 1508 (2005)(retaliation is a form of intentional discrimination). At a minimum, *Hibbs* requires that the retaliation provision of the

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Education and Labor, 99th Cong. 36, 42 n. 48 (1986)(hiring of female applicants hindered by employer's "assumption that women will become pregnant and leave the labor market").

FMLA be deemed a proper exercise of Fourteenth Amendment enforcement power as to the family-care provision. The decision below thus effectively divides the retaliation provision into separate care compartments, an approach that Congress neither intended nor, given its impracticality, would hardly endorse.

3. A facile syllogism perpetuates pre-*Hibbs* decisions in several courts of appeals, insulating them from the analytical framework established by *Hibbs*. The first premise is that *Hibbs* did not address the self-care or retaliation provisions. The second premise is that prior circuit decisions struck down one or both provisions. The conclusion is that those prior circuit decisions are, therefore, unaffected by *Hibbs*. *See Touvell*, 422 F.3d at 400 ("We do not believe that *Hibbs* undermines the holdings of the First, Second, Fourth, Tenth, and Eleventh Circuits that the self-care provision of the FMLA is unconstitutional insofar as it purports to abrogate state sovereign immunity.") Since *Hibbs*, *Brockman* relied in part on the syllogism. 342 F.3d at 1165 n. 3 ("Some of these decisions have been overruled by *Hibbs* with respect to subsection ©, but the invalidation of the self-care provisions in subsection (D) stands.")(citations omitted). In *Hibbs*, 538 U.S. at 726, the decision cited to reflect a circuit split, *Kazmier v. Widmann,* 225 F.3d 519, 529 (5th Cir. 2000), struck down both the family-care and the self-care provisions.

Unless this Court applies the analytical framework in *Hibbs* to the self-care and retaliation provisions, those circuit decisions will, by operation of the doctrine of *stare decisis* and internal circuit rules on panels being governed by earlier panel decisions, continue to resolve the question presented in this Petition without meaningful recourse to the *Hibbs* analytical framework. This dynamic enshrines a discredited analytical framework.